

THOMPSON WILLSON AND OTHERS, PLAINTIFFS IN ERROR *vs.* THE
BLACK BIRD CREEK MARSH COMPANY, DEFENDANTS.

This Court has frequently decided, that to sustain its jurisdiction in appeals and writs of error, it is not necessary to state, in terms, upon the record, that the constitution, or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judicial act, if the record shows that the constitution or a law of the United States must have been misconstrued, or the decision could not have been made; or that the constitutionality of a state law was questioned, and the decision was in favour of the party claiming under such law. [250]

The act of the assembly of the state of Delaware, by which the construction of the dam erected by the plaintiffs was authorised, shows plainly that this is one of those many creeks passing through a deep level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks, must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the general government, are, undoubtedly, within those which are reserved to the states. But the measure authorised by this act, stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution, or a law of the United States, is an affair between the government of Delaware and its citizens; of which this Court can take no cognizance. [251]

If congress had passed any act, in execution of the power to regulate commerce, the object of which was, to control state legislation over these small navigable creeks, into which the tide ebbs and flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying, that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware is placed entirely on its repugnancy to the law to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised, as to affect this question. [252]

THIS was a writ of error to the high court of errors and appeals of the state of Delaware.

The Black Bird Creek Marsh Company were incorporated by an act of the general assembly of Delaware, passed in February 1822; and the owners and possessors of the marsh, cripple, and low grounds in Appoquinimink hundred, in New Castle county, and state of Delaware, lying on both sides of Black Bird Creek, below Mathews's landing, and extending to the river Delaware; were authorised and empowered to

[Willson and others vs. The Black Bird Creek Marsh Company.]

make and construct a good and sufficient dam across said creek, at such place as the managers or a majority of them shall find to be most suitable for the purpose; and also, to bank the said marsh, cripple, and low ground, &c.

After the passing of this act, the company proceeded to erect and place in the creek a dam, by which the navigation of the creek was obstructed; also embanking the creek, and carrying into execution all the purposes of their incorporation.

The defendants being the owners, &c. of a sloop called the Sally, of 95 9-95ths tons, regularly licensed and enrolled according to the navigation laws of the United States, broke and injured the dam so erected by the company; and thereupon an action of trespass, vi et armis, was instituted against them in the supreme court of the state of Delaware, in which damages were claimed amounting to \$20,000. To the declaration filed in the supreme court, the defendants filed three pleas; the first only of which being noticed by the Court in their decision, the second and third are omitted.

This plea was in the following terms:

1. That the place where the supposed trespass is alleged to have been committed, was, and still is, part and parcel of said Black Bird Creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed and re-flowed; in which there was, and of right ought to have been, a certain common and public way, in the nature of a highway, for all the citizens of the state of Delaware and of the United States, with sloops or other vessels to navigate, sail, pass and repass, into, over, through, in, and upon the same, at all times of the year, at their own free will and pleasure.

Therefore the said defendants, being citizens of the state of Delaware and of the United States, with the said sloop, sailed in and upon the said creek, in which, &c. as they lawfully might for the cause aforesaid: and because the said gum piles, &c. bank and dam, in the said declaration mentioned, &c. had been wrongfully erected, and were there wrongfully continued standing, and being in and across said navigable creek, and obstructing the same, so that without pulling up,

[Willson and others *vs.* The Black Bird Creek Marsh Company.]

cutting, breaking, and destroying the said gum piles, &c. bank and dam respectively, the said defendants could not pass and repass with the said sloop, into, through, over, and along the said navigable creek. And that the defendants, in order to remove the said obstructions, pulled up, cut, broke, &c. as in the said declaration mentioned, doing no unnecessary damage to the said Black Bird Creek Marsh Company; which is the same supposed trespass, &c.

The plaintiffs, in the supreme court of the state, demurred generally to all the pleas; and the court sustained the demurrers, and gave judgment in their favour. This judgment was affirmed in the court of appeals, and the record remanded, for the purpose of having the damages assessed by a jury. Final judgment having been entered on the verdict of the jury, it was again carried to the court of appeals, where it was affirmed, and was now brought before this Court, by the defendants in that court, for its review.

The case was argued for the plaintiffs in error by Mr. Coxe; and by Mr. Wirt, attorney general, for the defendants.

Mr. Coxe insisted that the record contained a case in which the constitutionality of a law of the state of Delaware had been brought into question; and the decision of the highest tribunal of the state had been in favour of its constitutionality. Under the provisions of the 25th section of the judiciary law, this case is, therefore, protected before this Court.

It may be admitted that other questions were presented to the courts of Delaware. As the act incorporating the defendants in error was subsequently, in part, repealed, those courts had before them other questions arising under the repealing statute. But he contended, that upon the authority of many cases decided in this Court, there was sufficient apparent on the record, to show that the constitutionality of the law to which the plaintiff in error objects, must have been decided before those tribunals.

It has been repeatedly held, that to give this Court jurisdiction it is not necessary that the constitutionality of the law shall have been specially questioned before the state

[Willson and others vs. The Black Bird Creek Marsh Company.]

court. If upon examination of the record it shall be found that unless the court should have held the law to be constitutional, they could not have given the judgment presented by the record, it is sufficient to maintain the jurisdiction here, under the act of congress.

Mr. Coxe contended that the judgment of the high court of errors and appeals was erroneous, because the act of the general assembly of the state of Delaware, so far as the same authorized the company to shut up and embank across a navigable stream, below the ebb and flow of the tide, is repugnant to the constitution of the United States; and conferred no valid authority upon the company to destroy the navigation of the creek. He also considered the second act of the legislature of Delaware as a repeal of the provisions of the first law. The Court not having noticed this point in their decision, the arguments of counsel upon it are omitted.

The first plea having stated the river to be navigable, it is against the principles of the common law to obstruct it. 10 *Mass. Rep.* 70. The rights of navigation are public rights, belonging to all the citizens of the United States. The use of them is necessary for the purposes of commerce to the whole people of the United States.

Navigable streams are the waters of the United States. 9 *Wheaton*, 187.

He urged that the constitutional power of congress to regulate commerce, includes navigation; and the states are by this provision deprived of the power of closing a navigable river. In this case, the sloop was a licensed and enrolled vessel to carry on the coasting trade; and she was unlawfully and unconstitutionally impeded in the use of her license, by the dam erected by the defendants, under the unconstitutional act of the assembly of Delaware.

The statute of Delaware does not look to the preservation of the health of the citizens of the state; but to private emolument.

Upon the right of navigation being *jus publicum*, Mr Coxe cited *Coop. Justinian*, 68. *Angel*, 15. *Vattel*, 178, Lib. I. sec.

[Willson and others vs. the Black-Bird Creek Marsh Company.]

234, &c. 1 *Halstead*, 72, 76. *Angel*, 167. *Hargrave's Collection*, 36, 72, 87. He relied on the decision of this Court in *Gibbons vs. Ogden*, 9 *Wheaton*, 187, as a conclusive authority for the plaintiffs in error.

If Delaware has no right to restrain particular vessels from using her navigable streams, she cannot stop the navigation of those streams.

Mr Wirt, for the defendants, contended that the record does not present a case in which this Court has jurisdiction. The courts of Delaware might have decided in favour of the defendants in error without sustaining the constitutionality of the act of incorporation; and this Court will not assume that the question was decided, if upon other grounds the opinion of the state court could be maintained. In *Mathews vs. Zane*, the Court held that the question of constitutionality must have arisen inevitably. Does the act authorising the erection of this dam violate the constitution of the United States? It is admitted that the creek was navigable; and that the stream was a public highway. But it is asked whether the legislature of a state may not stop up a public highway within the territories of the state? Parliament, in England, exercises the power to stop up streams, which are public highways. 4 *Barn. & Cress*. 589.

It cannot be urged that the power to regulate commerce can interfere with the rights of the states over the property within their boundaries. While the waters of the United States belong to the whole people of the nation, this creek continued subject to the power of the state in whose territory it rises. It is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes; and can it be asserted, that a law authorising the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigour, is unconstitutional?

The power given by the constitution to congress to regulate commerce, may not be exercised to prevent such mea-

[Willson and others *vs.* The Black Bird Creek Marsh Company.]

tures; and there has been no legislation by congress under the constitution, with which the proceedings of the defendants under the law of Delaware have interfered.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.

Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided.

The plaintiffs sustain their right to build a dam across the creek by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

The plea does not controvert the existence of the act, but denies its capacity to authorise the construction of a dam across a navigable stream, in which the tide ebbs and flows; and in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act; and the judgment of the court must have been in favour of its validity. Its consistency with, or repugnancy to the constitution of the United States, necessarily arises upon these pleadings, and must have been determined. This Court has repeatedly decided in favour of its jurisdiction in such a case. *Martin vs. Hunter's lessee*(a),

(a) 1 *Wheaton*, 355.

[Willson and others *vs.* The Black Bird Creek Marsh Company.]

Miller *vs.* Nicholls(b), and Williams *vs.* Norris(c), are expressly in point. They establish, as far as precedents can establish any thing, that it is not necessary to state in terms on the record, that the constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the judicial act, if the record shows, that the constitution or a law or a treaty of the United States must have been misconstrued; or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favour of the party claiming under such law.

The jurisdiction of the Court being established, the more doubtful question is to be considered, whether the act incorporating the Black Bird Creek Marsh Company is repugnant to the constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorised by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes

(b) 4 *Wheaton*, 311.

(c) 12 *Wheaton*, 117.

[Willson and others *vs.* The Black Bird Creek Marsh Company.]

in conflict with the power of the United States "to regulate commerce with foreign nations and among the several states."

If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek; can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is affirmed.

This cause came on to be heard on the transcript of the record from the high court of errors and appeals of the state of Delaware, and was argued by counsel; on consideration whereof this Court is of opinion, that there is no error in the judgment of the said high court of errors and appeals of the state of Delaware; whereupon it is considered, ordered and adjudged by this Court, that the judgment of the said court in this cause, be, and the same is, hereby affirmed with costs.